

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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| In the Matter of:                                                                                                                   | ) |                      |
|                                                                                                                                     | ) |                      |
| Improving Public Safety Communications                                                                                              | ) | WT Docket No. 02-55  |
| In the 800 MHz Band                                                                                                                 | ) |                      |
|                                                                                                                                     | ) |                      |
| Consolidating the 800 and 900 MHz Industrial/<br>Land Transportation and Business Pool Channels                                     | ) | ET Docket No. 00-258 |
| To Allocate Spectrum Below 3 GHz for Mobile                                                                                         | ) |                      |
| And Fixed Services to Support the Introduction of                                                                                   | ) |                      |
| New Advanced Wireless Services, including                                                                                           | ) |                      |
| Third Generation Wireless Services                                                                                                  | ) |                      |
|                                                                                                                                     | ) |                      |
| Petition for Rule Making of the Wireless<br>Information Networks Forum Concerning the<br>Unlicensed Personal Communications Service | ) | RM-9498              |
|                                                                                                                                     | ) |                      |
| Petition for Rule Making of UT Starcom, Inc.<br>Concerning the Unlicensed Personal<br>Communications Service                        | ) | RM-10024             |
|                                                                                                                                     | ) |                      |
| Amendment of Section 2.106 of the Commission's<br>Rules to Allocate Spectrum at 2 GHz for Use by<br>The Mobile Satellite Service    | ) | ET Docket No. 95-18  |
|                                                                                                                                     | ) |                      |
| To: The Commission                                                                                                                  |   |                      |

**COASTAL SMR NETWORK, L.L.C. AND  
SAFETY AND FREQUENCY EQUITY COMPETITION COALITION  
JOINT REPLY TO OPPOSITION**

Coastal SMR Network, L.L.C. and its affiliates<sup>1</sup> ("Coastal"), and the Safety and Frequency Equity Competition Coalition ("SAFE") (collectively, the "Petitioners"),<sup>2</sup> by their attorneys, and pursuant to §1.429(g) of the Commission's rules, hereby submit this Joint Reply

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<sup>1</sup> Commercial Radio Service Corp. and A.R.C., Inc. d/b/a Antenna Rentals Corp.

<sup>2</sup> SAFE is an association of non-Nextel EA licensees, including Coastal SMR Network, L.L.C.; A.R.C., Inc. d/b/a Antenna Rentals Corp; Skitronics, LLC; Waccamaw Wireless, LLC; and CRSC Holdings, Inc.

to Opposition, responding to the Opposition and Comments of Nextel Communications, Inc. ("Nextel"), as filed on April 21, 2005 ("Nextel Opposition"). As a general matter, Nextel continues to hide its anti-competitive objectives behind public safety rhetoric, while, in fact, Nextel's economic interests are being advanced at the expense of its smaller, regional competitors. The Petitioners seek to redress the harm done to the economic value of their spectrum holdings and are not seeking to be "unjustly enriched."

**I. PUBLIC NOTICE WAS INSUFFICIENT TO PROVIDE THE PETITIONERS WITH AN OPPORTUNITY TO PARTICIPATE MEANINGFULLY IN THE RULEMAKING**

The Commission did not give high-site SMR licensees sufficient notice of the amendment of Section 90.693 of the Commission's Rules.<sup>3</sup> Nextel argues that Petitioners' participation in the rulemaking proceeding is evidence of sufficient notice. Nextel's argument to this effect is completely illogical. In addition, Nextel has not demonstrated that the Commission met its obligation to provide sufficient notice of this rule change.

Petitioners could only meaningfully participate in the rulemaking to the extent they were put on notice of the terms or substance of the proposed rule, or a description of the subjects and issues involved. 5 U.S.C. § 553(b)(3). The notice given by the Commission did not fairly apprise the public of the potential change in SMR licensing resulting in the amendment of

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<sup>3</sup> See § 90.693(d)(1) (which, until the *Report and Order* became effective, provided that "Incumbent licensees operating at multiple sites may, after grant of EA licenses has been completed, exchange multiple site licenses for a single license, authorizing operations throughout the contiguous and overlapping 40 dBmV/m field strength contours of the multiple sites. Incumbents exercising this license exchange option must submit specific information on Form 601 for each of their external base sites after the close of the 800 MHz SMR auction. The incumbent's geographic license area is defined by the contiguous and overlapping 22 dBmV/m contours of its constructed and operational external base stations and interior sites that are constructed within the construction period applicable to the incumbent. Once the geographic license is issued, facilities that are added within an incumbent's existing footprint and that are not subject to prior approval by the Commission will not be subject to construction requirements.")

Section 90.693. There was no notice of rule changes that would eliminate licensee discretion to convert from high-site SMR operations to high-density cellular configurations.

There is a great difference between the issues of retuning covered in the public notice and the changes in the conversion rights adopted, which were unaddressed in the public notice. Given the limitations of the public notice provided in this proceeding, it is entirely conceivable that non-Nextel SMR licensees, including the Petitioners, believed the Commission would give all SMR licensees the option of converting their operations from high-site to cellular systems under any new band plan adopted. Nowhere is there any notice to the contrary. Nowhere did the Commission ever give any notice that licensees would lose their right to convert their site-based licenses. Simply put, the conversion-rights issue was not a subject of the proceeding – it was an unforeseeable result. The Petitioners never had the opportunity to comment on the issue. The fact that Petitioners participated in the proceeding on other issues is relevant only so far as it suggests they probably would have commented on the conversion-rights issue had they known it was an issue.

The remedy for the lack of notice is straightforward. All EA licensees who elect to relocate their EA licenses to the upper portion of the new band plan – the cellular block at 862 MHz and above – should be given the option of relocating their site-specific licenses to the same cellular band segment, regardless of the configuration of their current facilities. The relative allocations within the new band plan may need to be adjusted to accommodate these elections, and if these licensees elect to relocate their site-specific licenses to the cellular band segment, they should bear their own relocation costs.

## II. SIGNIFICANT PORTIONS OF THE REPORT AND ORDER LACK A RATIONAL BASIS

There is no rational basis in the *Report and Order*<sup>4</sup> for the Commission to conclude that the band segments are adequate to avoid service degradation to non-Nextel SMR licensees, or public safety licensees. The *Report and Order* is vague about whether the replacement channels will afford the same geographic coverage. Nextel argues that the Commission's *Order Denying Stay* cures this vagueness by stating that comparable facilities are "those that will provide the same level of service as the incumbents existing facilities."<sup>5</sup> However, as stated in the Joint Petition for Partial Reconsideration of Coastal SMR Network, L.L.C./A.R.C., Inc. and Scott C. Macintyre, filed December 22, 2004 in this proceeding ("Joint Petition"), the Commission has not performed the necessary technical analysis to verify that such an outcome is assured. Consequently, Nextel's argument fails to reach the underlying issue. Moreover, Nextel fails to address the absence of any technical study in the record of this proceeding indicating that, post-relocation, there is sufficient spectrum for relocated non-Nextel SMR licensees and public safety licensees to have a sufficiently high degree of service replication.

Nextel completely mischaracterizes the Petitioners' arguments, and defends the "comparable facilities" concept as if the Petitioners were attacking it. The Petitioners referred to "comparable facilities" only to show that the Commission has no technical record to support a conclusion that displaced SMR licensees will receive adequate replacement spectrum to ensure their ability to offer the same levels of services. The comparable facilities standard relates to

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<sup>4</sup> See *Improving Public Safety Communications in the 800 MHz Band, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, WT Docket No. 02-55, et al., FCC 04-168 (Rel. August 6, 2004) ("*Report and Order*").

<sup>5</sup> See *Improving Public Safety Communications in the 800 MHz Band, Order*, 20 FCC Rcd 641, para. 14 (Public Safety and Critical Infrastructure Division 2005) ("*Order Denying Stay*").

equipment replacements (measuring the adequacy of reimbursement for displaced entities) and is no answer to the policy and legal issues raised by the Petitioners.

Indeed, as Nextel asserts, the decision in Teledesic, LLC v. FCC affirmed the Commission's use of a "comparable facilities" standard.<sup>6</sup> However, Nextel neglects to mention that the Court observed that the FCC's goal was to "protect the investment in those [displaced] services."<sup>7</sup> Further, the Court found that the FCC's requirement was justified in that it protected incumbents who "might be put out of business when displaced."<sup>8</sup> These goals go hand-in-hand with the application of a comparable facilities standard, and they are altogether missing in the *Report and Order*. The Commission should reconsider the harsh impact on Petitioners' investments in spectrum, and act to prevent unnecessary harm.

### **III. NEXTEL'S EQUITABLE ARGUMENTS ARE MERITLESS**

Nextel's claim that Petitioners would not build a "true high-density cellular network" because they have not invested in spectrum is factually incorrect. The Petitioners *have* invested in the spectrum necessary to build such a system, and, but for the regulatory barrier recently adopted, would be going forward with their plans. Nextel would have the Petitioners elect to remain in the non-cellular segment of the band and "convert to low density cellular technology." From an economic perspective, however, this is a harmful outcome for the Petitioners. Petitioners invested in spectrum in Auctions 34 and 36, based on the knowledge that their spectrum resources for construction of a high-density cellular system would include their site-specific licenses. To have these site-specific licenses reduced to high-site configuration

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<sup>6</sup> 275 F.3d 75 (D.C. Cir. 2001) ("*Teledesic*")

<sup>7</sup> *Teledesic* at 80.

<sup>8</sup> *Teledesic* at 85.

forever greatly harms the value, not only of the site-specific licenses, but the value of the EA licenses, too.<sup>9</sup>

Nextel argues that the Petitioners sat on their rights to convert to high-density cellular architecture. Nextel boasts that it pushed ahead with the integration of site-based SMR systems with its EA licenses in high-density configuration during the pendency of this rulemaking, while smaller operators, such as the Petitioners did not. However, Nextel has market power in the dispatch market, and, as such, enjoys the ability to shift future conversion costs onto its customers, or to subsidize equipment conversion much more easily than the Petitioners. The Petitioners -- providers of dispatch-only services -- are not as economically robust as dispatch providers with integrated mobile telephone service offerings. That is why Petitioners' entire business future is now at risk, if they cannot utilize all of their spectrum resources in the conversion to a high-density configuration in the future.

Nextel's argument ignores the arbitrariness of the November 22, 2004 cut-off date (triggered by the publishing of the *Report and Order* in the Federal Register), after which SMR licensees that had not integrated their site-based licenses with their EA licenses would no longer be able to do so. This date served no public interest other than the establishment of a date certain. If certainty were the Commission's sole justification, it could have set forth a date-certain for *elections* by EA license holders who desire to utilize site-specific licenses in the construction of a high-density cellular system. In addition, it could have subjected these same entities to construction deadlines for such systems if they elected relocation to the cellular portion of the band, and face a loss of licenses if those deadlines were not met. Had the

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<sup>9</sup> See *Affidavit of Daniel C. Hobson*, attached as Exhibit 1A to the *SAFE Competition Coalition Petition to Deny* in WT Docket No. 05-63, filed March 30, 2005.

Commission selected such alternatives, it would have created certainty while avoiding harm to the Petitioners and other similarly situated licensees.

In addition to glossing over the issue of notice, the lack of a rational basis for certain conclusions, and generally mischaracterizing the motivations of the Petitioners, Nextel's Opposition stands silent on a number of critical issues raised in the Joint Petition. It offers no real answer to the fact that the Commission exceeded its authority in compensating Nextel with preferential access to spectrum. Joint Petition at 12. In addition, Nextel ignores the fact that the Commission's preferential treatment of Nextel destroys the regulatory parity mandated by Section 332 of the Communications Act of 1934, as amended. Joint Petition at 14.

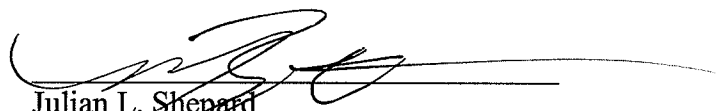
#### **IV. CONCLUSION**

Petitioners' objective is to regain the right to construct the high-density cellular systems as provided in the Commission's pre-*Report and Order* rules. Relocation of an EA licensee's site-specific licenses in the spectrum above 862 MHz would not recreate any interference problems for public safety. Moreover, there is no evidence that there is insufficient spectrum to accommodate these site-specific licenses in this manner.

Respectfully submitted,

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and  
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May 2, 2005



## CERTIFICATE OF SERVICE

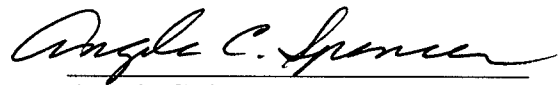
I, Angela C. Spencer, hereby certify that on this 2<sup>nd</sup> day of May, 2005, copies of the foregoing "Coastal SMR Network, L.L.C. and Safety and Frequency Equity Competition Coalition Joint Reply to Opposition" were delivered by first-class U.S. mail, postage prepaid, addressed to the following parties:

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